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**Vallow Floor Coverings, Inc. and Vallow Carpet Installation, Inc., Alter Egos and Southern Illinois District Council of Carpenters affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 14-CA-24602**

August 23, 2001

**DECISION AND ORDER**

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN  
AND TRUESDALE

On November 2, 1998, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup>

The judge found that Vallow Floor Coverings, Inc. (VFC), and Vallow Carpet Installation, Inc. (VCI) (together the Respondent) were alter egos. He also found that the Respondent violated Section 8(a)(5) of the Act by refusing, since March 14, 1991, to apply the terms of its collective-bargaining agreement with the Union to all bargaining unit employees. We affirm those findings for the reasons discussed in the judge's decision.

The Respondent, however, argues that the complaint in this case is barred by Section 10(b) of the Act, which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge." The Re-

spondent contends that the Union knew of the alleged violations as much as 6 years before it filed its charge, and therefore that the complaint is time-barred. The judge rejected this contention. We agree with the judge.

Although Section 10(b) bars a complaint based on unlawful conduct occurring more than 6 months before the filing and service of the charge, the Board has consistently held that the 10(b) period does not commence until the charging party has "clear and unequivocal notice" of the violation. See, e.g., *A&L Underground*, 302 NLRB 467, 469 (1991). Here, the judge found that the Union first discovered that there were two Vallow companies performing installation work, one of which (VFC) was not complying with the collective-bargaining agreement, in early 1997. He therefore found that the original charge, which was filed June 4, 1997, was timely.

Central to our assessment of the judge's findings is the distinction the Board drew in *A&L Underground* between a simple failure to abide by the terms of a collective-bargaining agreement and an outright repudiation of the agreement itself. The Board held that when an employer completely repudiates the contract, the unfair labor practice is committed at the moment of the repudiation, and the 10(b) period begins to run when the union has clear and unequivocal notice of the repudiation. Any subsequent failures or refusals to honor the terms of the contract do not constitute unfair labor practices themselves, but are simply the effect or result of the repudiation.<sup>3</sup> Accordingly, the union must file its charge within 6 months after receiving clear and unequivocal notice of the repudiation or a complaint based on that conduct will be time-barred, even with regard to contract violations within the 10(b) period. *Id.*

By contrast, the Board in *A&L Underground* held that if the employer does not repudiate the contract, but only breaches its provisions, each successive breach constitutes a separate unfair labor practice unrelated to previous breaches. Consequently, the fact that one or more of the breaches occurred outside the 10(b) period does not bar a complaint alleging contract violations within the 10(b) period. *Id.*

Under *A&L Underground*, then, if the Union had clear and unequivocal notice, outside the 10(b) period, that the Respondent was repudiating the contract, the complaint would be time-barred. If, on the other hand, the Union had clear and unequivocal notice, outside the 10(b) period, that the Respondent was simply failing to observe certain terms of the contract, the complaint would not be time-barred, but the only relief that could be provided

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Hurtgen notes that the parties litigated this case on the basis of alter ego and not single employer. He agrees with the judge that Vallow Floor Coverings, Inc. (VFC) and Vallow Carpet Installation, Inc. (VCI) are alter egos. In making this finding, the judge noted that VCI was created to allow VFC to avoid its collective-bargaining responsibilities. In view of this, Chairman Hurtgen finds it unnecessary to reach the issue of whether antiunion motive is the sine qua non of an alter ego finding.

<sup>2</sup> We shall modify the Order to provide for backpay as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971).

<sup>3</sup> See *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960).

would be for the contract violations that occurred during the 10(b) period. Of course, if the Union first received clear and unequivocal notice of the Respondent's unfair labor practices within the 10(b) period, as the judge found, the complaint would not be time-barred with respect to any of the alleged violations.

Applying the foregoing principles to the facts of this case, we agree with the judge that the Respondent's 10(b) defense lacks merit. As stated, the original charge was filed on June 4, 1997. The Respondent argues that, as early as March 1991 and again in 1996, it informed the Union of its dual operation, one entity in compliance with the collective-bargaining agreement and one entity not in compliance, and gained the Union's approval of this double-breasted operation. However, this argument is based on the testimony of the Respondent's witnesses concerning two conversations, which the judge specifically discredited. Accordingly, that testimony does not establish that, as a result of those conversations, the Union had clear and unequivocal notice of either a complete contract repudiation or even a simple breach of contract.

The Respondent also relies on an incident that took place in December 1995. The Respondent's witness, VFC installer-employee Corey Carroll testified that while he was on a VFC job, union organizer John Wyrostek visited the jobsite and asked about "union guys on the job." Carroll said that there were none and that he was not a member of the Union. Wyrostek asked for his name and address and said that Carroll would hear from him, but Carroll heard nothing. Wyrostek admitted that he visited the site and spoke to Carroll, but he denied asking if the workers were union members. The judge did not resolve the testimonial discrepancy. Instead, he found that, even under Carroll's version, the Union was not put on notice that VCI and VFC were alter egos and that Vallow was operating on a double-breasted basis. Thus, the judge found that the Union did not have clear and unequivocal notice of the Respondent's unlawful actions outside the 10(b) period.

Again, we agree with the judge. Accepting Carroll's testimony as true, all that he told Wyrostek was that he and other employees were not union members. This is a far cry from an employer's clearly and unequivocally telling a union that it is repudiating, or even not abiding by, a collective-bargaining agreement.

Accordingly, we agree with the judge that the Respondent failed to show that the Union, more than 6 months before it filed its charge in this case, had "clear and unequivocal notice" of the Respondent's unlawful actions.

We also agree with the judge that the correct remedy here is to require the Respondent to comply retroactively

with its contracts commencing March 14, 1991, and to make employees whole from that date.<sup>4</sup>

The Respondent, relying on *Burgess Construction*, 227 NLRB 765 (1977), argues in exceptions that even assuming that it violated the Act as alleged, it did not fraudulently conceal its alleged unlawful conduct and, therefore, the judge erred by failing to restrict the remedy to 6 months before the charge was filed. We disagree. As the Board explained in *Pullman Building Co.*, 251 NLRB 1048 (1980), notwithstanding the absence of fraudulent concealment of conduct in violation of the Act:

There is no logical reason to restrict the remedy to 6 months before the charge was filed, where, as in *Burgess*, the Union did not immediately become aware of unfair labor practices through no fault of its own. Once the 10(b) period has been tolled for the purpose of filing the charge, the case is before us on the same basis as is any other case, and hence the usual make-whole remedy is the appropriate one.

In accord with *Pullman*, the appropriate remedy in this case is the one that the judge recommended.

The Respondent also cites *American Thoro-Clean*, 283 NLRB 1107, 1109, fn. 11 (1987) and *Al Bryant, Inc.*, 260 NLRB 128, fn. 3 (1982), enfd. 711 F.2d 543 (3d Cir. 1983), as support for limiting the remedy to the 10(b) period. Again, we disagree. Both cases are distinguishable on the basis of union knowledge of actionable unfair labor practices. Unlike the instant case, the union in *American Thoro-Clean* and the "Keystone" union in *Al Bryant* knew or had reason to know that the respondents therein were violating the Act well before commencement of the 10(b) period.<sup>5</sup> Under these circumstances, as explained by the judge in *American Thoro-Clean* (283 NLRB at 1118-1119), equitable estoppel principles warrant limiting a remedy to the 10(b) period.<sup>6</sup> By contrast, where, as here, the Union neither knew or had reason to know until 1997 that the Respondent had been violating

<sup>4</sup> March 14, 1991, marks the date when the Respondent and the Union signed a successor master agreement and its residential addenda.

<sup>5</sup> The Board found no 10(b) bar to the finding of a violation in these two cases. The cases were decided prior to *A&L Underground*, supra. Since the union in these cases had notice outside the 10(b) period, it is questionable whether the Board, under *A&L Underground*, would find no 10(b) bar to the finding of a violation in these cases. See fn.7 of *A&L Underground*.

<sup>6</sup> Although the Board in fn. 3 of *Al Bryant* did limit the remedy to the 10(b) date of April 3, 1979, with respect to the "Western" union, it did so not because that union knew or should have known that violations were occurring before that date, but because, as found by the judge (at 134), there was no evidence that an unfair labor practice had, in fact, been committed before then.

the Act since 1991, extension of the remedy beyond the 10(b) date to 1991 is appropriate.<sup>7</sup>

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Vallow Floor Coverings, Inc., and Vallow Installation, Inc., alter egos, Edwardsville, Illinois, its officers, agents, successors, and assigns, shall take the action as set forth in the Order.

Dated, Washington, D.C. August 23, 2001

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Wilma B. Liebman, Member

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John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring.

I agree with the conclusion reached by my colleagues. However, I do not agree that “an outright repudiation” of the agreement is the only event that will trigger the 10(b) period. Rather, a failure to apply the contract terms can amount to a de facto repudiation, provided that the union has actual or constructive knowledge of that failure.<sup>1</sup> In the instant case, Respondent failed to adduce sufficient evidence that the Union had actual or constructive knowledge of such a repudiation or failure to apply the contract.

Dated, Washington, D.C. August 23, 2001

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Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

*Kathy J. Talbott-Schehl, Esq.*, for the General Counsel  
*Vance D. Miller, Esq.*, *St. Louis, Missouri*, for the Respondent  
*Gerald Kretmar, Esq.*, *St. Louis, Missouri*, for the Charging Party.

<sup>7</sup> Chairman Hurtgen agrees that VFC and VCI are alter egos. An alter ego is the “disguised continuance” of the other entity and, as here, is created with an antiunion motive. Accordingly, although this case may not meet the standards of “fraudulent concealment,” it is sufficiently close to warrant the application of the remedial principles of that doctrine. Thus, as in “fraudulent concealment” cases, Chairman Hurtgen agrees to extend the remedy here back to 1991.

<sup>1</sup> By contrast, specific contract breaches (which amount to unlawful unilateral changes or modifications) are not repudiations.

### DECISION

#### STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon a charge filed on June 4, 1997, and amended on August 27, 1997, by Southern Illinois District Council of Carpenters affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein referred to as the Union, against Vallow Floor Coverings, Inc., and its alleged alter ego, Vallow Carpet Installation, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14, issued a Complaint dated August 28, 1997, alleging violations by Respondent of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent, by its Answers, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in St. Louis, Missouri, on November 18, and 19, 1997, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, and from my observations of the witnesses, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, Vallow Floor Coverings, Inc. (VFC), an Illinois corporation, operates a retail facility at 500 East Vandalia, Edwardsville, Illinois, and is engaged in the retail sale and installation of floor coverings and related products. Respondent, Vallow Carpet Installation, Inc. (VCI), an Illinois corporation, has its office at the same location and is engaged in the installation of floor coverings. During the year ending May 31, 1997, Respondent VFC, and Respondent VCI, individually and collectively, in conducting their business operations, purchased and received at the Edwardsville, facility, goods valued in excess of \$50,000, sent directly from points located outside the State of Illinois. Having concluded, *infra*, that VFC and VCI are, as alleged in the Complaint, alter ego companies, I find that, together, they constitute an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

##### II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. Background

Respondent, VFC, was incorporated on April 13, 1983, with a capital investment of \$39,000. The officers and directors of the company are Richard Vallow, president, his wife, Beverly Vallow, corporate secretary and their son, Mark Vallow, treasurer. Richard Vallow and Beverly Vallow each own 26 percent shares of VFC, and the remaining corporate shares are owned, equally, by Mark Vallow and his brother-in-law, Seth Renken.

In 1988, Richard Vallow, on behalf of VFC, signed the 1987, to 1990, master agreement between the Union and the Southern Illinois Builders Association, governing the wages, hours and working conditions of, *inter alia*, residential and commercial floor covering installers employed by signatory employers in the building and construction industry in Southern Illinois. VFC also signed residential addenda to that agreement, providing for lower wage rates on residential projects. During the term of the contract, VFC made contributions to the contractual fringe benefit funds, based upon reported work hours, on behalf of Mark Vallow, Seth Renken and employee Don Smith. Smith was terminated in March, 1991.

After the July 31, 1990, expiration of the 1987, to 1990, agreement, Richard Vallow voiced objection to the negotiated successor contract covering the 1990, to 1993, period. However, and following discussions with Tom Eversmann, then the Union's business representative for Local 295, which serviced the VFC unit on behalf of the District Council, Richard Vallow agreed, in 1991, to sign the successor. He did so, on or before March 14, 1991, on behalf of Respondent, VCI. Concurrently, he also so signed the new residential addendum. Eversmann, for the Union, signed those documents on March 14. Thereafter, on March 20, 1991, VCI was incorporated with a capital investment of \$1000. Beverly Vallow, president, Richard Vallow, treasurer, and Seth Renken, secretary, are the corporate officers and they, along with Mark Vallow, are the Company directors. The owners, or shareholders, are Richard (24 percent), Beverly (24 percent) and Mark Vallow (26 percent), and Seth Renken (26 percent). In 1994, Richard Vallow, as representative of VCI, signed the 1993, to 1998, contract and its addendum. Since March, 1991, VCI has made fringe benefit contributions, in its name, in accordance with reported hours, on behalf of Mark Vallow and Seth Renken and, occasionally, for very brief periods of time, a third or fourth installer.

In the instant case, the General Counsel contends that VFC and VCI are *alter egos*, and violated Section 8(a)(5) of the Act by refusing, since March 14, 1991, to apply the terms of its contracts with the Union to the VFC floor covering installers. Respondent urges that the two entities may not be viewed as *alter ego* employers and that, in any event, as the Union knew, or should have known, for years before it filed charges with the Board, that VCI was operated as a "union company," while VFC was not, and that both engaged in floor covering installation, the Complaint is time barred under Section 10(b) of the Act.

### B. Facts<sup>1</sup>

As noted, following expiration of the 1987, to 1990, contract, Richard Vallow did not immediately sign its successor. In October and November, he told Business Representative Eversmann that he, Vallow, would not execute the new agreement, for competitive reasons. Nonetheless, and despite the provision contained in the expired contract that it "will continue in full force and effect from year-to-year beyond July 31, 1990," unless, during the 60 to 90-day period prior to expiration, by "written notice," either party informs the other "of its desire to terminate or modify" the agreement, Vallow did not provide the requisite written notice. To the contrary, VFC continued to report fringe benefit hours for Mark Vallow, Renken and Smith, and made contributions to the funds on their behalf.

By letter dated February 22, 1991, Eversmann advised the employee fringe benefit funds office that, as VFC "has terminated its collective-bargaining agreement and has refused to sign a new agreement with the Southern Illinois District Council of Carpenters," it could not continue, legally, to make fringe benefit contributions for its employees. Eversmann sent courtesy copies of the letter to VFC and to Mark Vallow, Renken and Smith. At trial, Eversmann testified that the sending of such notices was tactical, designed to encourage reluctant contractors to sign successor collective-bargaining agreements. Five days later, Richard Vallow met with Eversmann at the union hall and, as indicated, by March 14, he had signed the 1990, to 1993, contract and its addendum. When Eversmann signed those documents, on March 14, he noted that Vallow had executed them on behalf of VCI, leading Eversmann to assume, he testified, that Vallow was separating his retail business from his installation business. In any event, and for the reasons noted at footnote 1, I reject entirely the disputed testimony of Richard Vallow and Mark Vallow that, in the period preceding contract execution, Eversmann had suggested to them that they form a second company to perform "union work," allowing Mark Vallow and Renken to maintain fringe benefit fund coverage, while utilizing VFC for jobs not requiring "union labor."

Following its March 20, 1991, incorporation, VCI has worked out of the same business address as VFC, without charge, and has utilized VFC's telephone number and fax number. While VFC is engaged in the retail sale of floor coverings, as well as its installation, in the Edwardsville, Glen Carbon, Collinsville and Bellesville, Illinois, areas, VCI engages, only, in the installation of floor products, in the same areas. Since

<sup>1</sup> The fact-findings contained herein are based upon a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, *infra*. In general, I have relied upon the testimony of Tom Eversmann, executive secretary/treasurer of the Southern Illinois District Council of Carpenters and, formerly, business representative for Carpenters Local 295, who impressed me as an honest and forthright witness. On the other hand, I have viewed with great suspicion the disputed portions of the testimony of Richard Vallow, and that of Mark Vallow, owners, officers and directors of VFC and VCI, in light of their demeanor as witnesses and the evasive and, at times, internally inconsistent manner in which they related events.

inception, VCI has performed work solely for VFC, and has no other customers. Indeed, all work performed by VCI is obtained and bid on by VFC, and VCI's only source of funds is from VFC. VFC owns the equipment, trucks and covering materials used by both companies, while VCI owns no floor covering products, supplies, materials, equipment, vehicles or tools but, rather, uses those of VFC, without charge. All vehicles are marked, "Vallow Floor Coverings."

VCI does not bid on jobs, nor does it submit invoices or bills to VFC for its installation work. Customers are billed by VFC, and submit payments to VFC, for work performed by VCI. Neither estimates nor bills indicate to the customer which company will perform the work. When VFC makes payment to the separate VCI bank checking account, it is not for services rendered, but, rather, an amount sufficient to cover the wages, fringe benefit contributions and payroll taxes for its installers, Mark Vallow and Renken, and the corporate and other taxes. Indeed, when work is performed for a customer, records are not maintained showing whether, and to what extent, one company or the other has handled the job. Rather, Richard Vallow testified, he estimates the amount of work performed by each Vallow entity by "What is in my mind. That is the only mechanism I use."

Mark Vallow and Renken receive a set salary each week from VCI, regardless of the number of hours they work. On the other hand, they receive no wages from VFC for the installation and other work they perform for that Company but, instead, are paid bonuses based upon the profits of the business. Vallow and Renken monitor and insure the proper installation of floor covering products by both VFC and VCI, and order the materials and supplies that they use.

Richard and Mark Vallow, and Seth Renken, manage the day-to-day affairs of both VFC and VCI and they, and Beverly Vallow, participate in the hiring, disciplining, instruction and assignment of all employees of both companies. Beverly Vallow supervises the clericals and secretaries of VFC, who perform administrative duties.

Prior to March, 1991, VFC performed floor installation work on residential and commercial "union projects." Since that time, VCI has performed the work when "union labor" is required. Although Richard Vallow initially testified that VCI was created to perform the commercial work as a "union contractor," while VFC was to do the residential work "non-union," the record evidence shows that both companies have performed commercial and residential work.

Eversmann credibly testified that he first learned that there were two Vallow entities performing installation work, one in compliance with the collective-bargaining agreement with the Union, and one not in compliance, early in 1997, when a non-signatory contractor asked one of the Union's business agents for a similar arrangement. Thereafter, Eversmann asked Local 295 business representative Lee Wallace to investigate, and to watch the Vallow jobs and check on who was working on them. As a result, Eversmann learned of floor covering installation jobs performed by Vallow, in the Spring of 1997, involving employees in addition to Mark Vallow and Renken, not referred by the Union, although Respondent generally reported fringe benefit hours for Mark Vallow and Renken, only. An

ensuing audit of Respondent's books, conducted by the fringe benefit funds, showed that the only transactions on VCI's books were the transfers of money from VFC for payment of wages, fringe benefit contributions and taxes. The charges in the instant case were then filed.

In support of its claim that the Union knew, long before 1997, of the dual Vallow floor covering installation operation, Respondent offered the testimony of VFC installer Corey Carroll, concerning an incident which occurred on December 26, 1995. On that date, he testified, as he and fellow installer Tim Sullivan lay carpet at a new house in Edwardsville, Illinois, Union organizer John Wyrostek appeared on the site and asked if there were "any union guys on the job." Carroll further testified that he told Wyrostek, no, and that he, Carroll, was not a member of the Union. Although, according to Carroll, Wyrostek asked for, and wrote down, Carroll's name and address, and told Carroll that he would hear from him, Carroll, in fact, never heard from Wyrostek again. Sullivan was not called to testify. Wyrostek, in his testimony, admitted to stopping at the jobsite and speaking to Carroll and another worker. He claimed that his purpose was to introduce himself and, as he knew that Vallow was a signatory contractor, he did not ask the workers if they were union members, or write down their names and addresses.

Mark Vallow testified that in February, 1996, at a jobsite, he told Business Representative Wallace about the dual operation, and that it had been approved by Eversmann. Wallace, in his testimony, while confirming that a conversation occurred, denied that Mark Vallow, or anyone else, so advised him. As I found Wallace a forthright and believable witness, while, as noted at footnote 1, I was not similarly impressed by Mark Vallow, I credit Wallace's testimony concerning the conversation in question, and find that it occurred as he testified.

### C. Conclusions

Formal termination requirements of the 1987, to 1990, collective-bargaining agreement aside, the record evidence establishes that, at least by the time of the Union's February 22, 1991, letter to the benefit funds office, with a courtesy copy sent to VFC, both the Union and VFC regarded their contractual relationship as ended. However, unwilling to accept lapse in the fringe benefit coverage for Mark Vallow and Seth Renken, Richard Vallow, on or before March 14, 1991, renewed a collective-bargaining relationship with the District Council. While, formally, he signed the new contract on behalf of VCI, a Company unknown as such to the Union, VCI was not yet in existence and was not created until later. In the circumstances, Richard Vallow's action must be seen as one on behalf of the Vallow entity which, at the time, included VFC, only. It is in this light, and against this background, that the *alter ego* question must be considered.

The Board will find an *alter ego* relationship to exist between two nominally separate entities if the two employers concerned have substantially identical management, business purpose, operations, equipment, customers and supervision, as well as ownership.<sup>2</sup> In the absence of an identity of ownership,

<sup>2</sup> *Advance Electric, Inc.*, 268 NLRB 1001 (1984).

or an ownership interest demonstrated by the holdings of one company in the other, the Board will examine whether the degree of control exercised by the first entity in the affairs of the second is such "as to obliterate any separation between them."<sup>3</sup> Additionally, the Board assesses whether the new or second company was created so as to allow the old employer to evade responsibilities under the Act, and whether the two entities deal with each other, if at all, at arm's length, with due regard for separateness.<sup>4</sup> However, unlawful motivation is not a necessary element of an alter ego finding.<sup>5</sup> Indeed, the Board has consistently held that no one factor, taken alone, is determinative, a substance-over-form approach approved by the courts. Thus, in *Omnitest Inspection Services*,<sup>6</sup> the Court, in enforcing the Board's order, stated:

[The Employer's] challenge to the Board's reliance on actual control suggests that an alter ego finding should turn upon formal ownership alone. This argument ignores the Board's decisions that the substantial identity of formal ownership is not the *sine qua non* of an alter ego relationship . . . . We are satisfied that the Board's multi-factor test is a reasonable construction of the Act, and that depending on the facts of the case, actual control can be more significant than formal ownership.

Once a finding of alter ego relationship is made, it follows that the collective-bargaining agreement of the one employer is binding upon the second entity.<sup>7</sup>

In applying the above criteria, Board case law also instructs that, in the absence of common ownership, the older company must exercise very substantial control over the new one, in order to support an alter ego finding. Further, the lack of anti-union motivation in the creation of the second entity generally militates against finding a "disguised continuance" of the original organization.

In this case, VFC and VCI are owned and controlled by the same four individual shareholders, in similar percentages, and those persons are the corporate directors and officers of both companies. As shown in the Statement of Facts, management and supervision of the two companies are identical. They are engaged in the exact same residential and commercial floor covering installation business, in the same geographic area, operate out of the same facility and use the same equipment, tools, trucks, materials and supplies to service the same customers. Nor do the two companies deal with each other at arm's length, or with regard for separateness. Rather, VCI utilizes the VFC facility without charge and, similarly, it enjoys use of the VFC materials and equipment at no cost to it. Indeed, VCI's only source of funds is the money deposited to its account by VFC, not for services rendered to VFC, but in sufficient amount, only, to allow VCI to pay wages, fringe benefit

contributions and taxes. The only mechanism used to separate the work performed by one company, from the work done by the other, as explained by Richard Vallow, is "what is in my mind." All work, by either entity, is bid on and obtained by VFC, without indication as to which company will do the job. All completed work is billed by VFC, for payment into a VFC bank account. No records are maintained showing work performed by VCI, or expenses generated by it.

In addition to the above, the record evidence shows that VCI was created immediately after the signing of the 1990, to 1993, collective-bargaining contract, without significant capitalization, demonstrably for the purpose of allowing for the continued contractual fringe benefit coverage of two of the VFC installers, while allowing VFC otherwise to avoid its collective-bargaining responsibilities. Indeed there is not a scintilla of evidence in the record to suggest any other reason why VCI was formed and, thereafter, was operated, essentially as an empty shell, without real separation from VFC.

All of the critical factors traditionally relied upon by the Board to support *alter ego* findings are present here. I thus conclude that VFC and VCI are alter ego companies, bound to the terms of the collective-bargaining agreements with the District Council signed by Richard Vallow.

In reaching the above conclusion, I reject Respondent's contention that the late 1995, casual conversation between Union representative Wyrostek and VFC installer Carroll, during which Carroll allegedly told Wyrostek that he was not a member of the Union, alerted, or should have alerted, the Union to the fact that VCI existed, as an alter ego of VFC, and that the Vallow entity was operating a double-breasted operation. Even accepting Carroll's version of this very brief conversation, Respondent utterly has failed to meet its burden, in support of its defense under Section 10(b) of the Act, to show that the Union, more than 6 months before it filed its charges in this case, had "clear and unequivocal notice" of Respondent's unlawful actions.<sup>8</sup>

#### IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

#### CONCLUSIONS OF LAW

1. Vallow Floor Coverings, Inc., and Vallow Carpet Installation, Inc., *alter egos*, constitute an employer engaged in com-

<sup>3</sup> *American Pacific Concrete Pipe Co.*, 262 NLRB 1223 (1982).

<sup>4</sup> *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enf. 725 F.2d 1416 (D.C. Cir. 1984).

<sup>5</sup> *Johnstown Corp.*, 313 NLRB 170 (1993), enf. denied and remanded 41 F. 3d 141 (3rd Cir. 1994), supp. dec. 322 NLRB 818 (1997).

<sup>6</sup> 297 NLRB 752 (1990), enf. 937 F. 2d 112 (3rd Cir. 1991).

<sup>7</sup> *Watt Electric Co.*, 273 NLRB 655 (1984).

<sup>8</sup> See *Chinese American Planning Council*, 307 NLRB 410 (1995).

merce, and in operations affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

2. Southern Illinois District Council of Carpenters affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All residential and commercial floor covering installers employed by Respondent at its Edwardsville, Illinois, facility, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union has been the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing, since March 14, 1991, to apply the terms of its collective-bargaining agreements with the Union to all unit employees, including payment to them of contractual wages and payment on their behalf of fringe benefit contributions, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:<sup>9</sup>

#### ORDER

Respondent, Vallow Floor Coverings, Inc., and Vallow Carpet Installation, Inc., alter egos, Edwardsville, Illinois, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union, in an appropriate unit, by refusing to apply the terms of its collective-bargaining agreements, including wage rates and fringe benefits fund contributions, to the employees of Vallow Floor Coverings, Inc.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Honor and abide by the terms and conditions of its executed contracts with the Union since March 14, 1991, and make whole its employees represented by the Union for any loss of pay and other benefits suffered as a result of Respondent's refusal to apply those contracts to all unit employees. Backpay shall be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Pay all contractually required fringe benefit fund contributions not previously paid, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, make

unit employees whole for any expenses resulting from the failure to make such contributions, with interest, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F. 2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Edwardsville, Illinois, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that Respondent has gone out of business or closed the facility involved in this proceeding, it shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since March 14, 1991.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that Respondent has taken to comply herewith.

Dated, Washington, DC November 2, 1998

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Southern Illinois District Council of Carpenters affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, in an appropriate bargaining unit of residential and commercial floor covering installers, by refusing to apply the terms of collective-bargaining agreements entered into with the Union to all unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

<sup>9</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>10</sup> In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall be changed to read "Posted Pursuant To A Judgement Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

WE WILL honor and abide by the terms and conditions of our contracts with the Union, since March 14, 1991, and make whole our employees represented by the Union for any loss of pay and other benefits suffered as a result of our refusal to apply those contracts to all unit employees, plus interest.

WE WILL pay all contractually required fringe benefit fund contributions not previously paid and make unit employees whole for any expenses resulting from our failure to make such contributions, plus interest.

VALLOW FLOOR COVERINGS, INC. AND  
VALLOW CARPET INSTALLATION, INC.